JURORS: THE POWER OF 12

PART TWO

Second Report of:

The Arizona Supreme Court Committee on the More Effective Use of Juries

June 1998

JURORS:
THE POWER OF 12

PART TWO

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INTRODUCTION

In late 1996, about two years after submission of its original report on jury reform, Jurors: The Power of 12, and one year after the Supreme Court's adoption of several new rules affecting jury trials, the committee was reconvened to consider a dozen additional issues.

One-half of the twelve issues now reported on were referred to the committee by others, including one or more Supreme Court justices. The remainder of the matters were suggested by committee members.

Two new members joined the committee for the three meetings that resulted in this second report: Charles Hastings, Yavapai County Attorney; and James Blake, Deputy County Attorney in Maricopa County. A complete committee roster is found behind Appendix 1 to this report.

The committee is pleased to present to the Supreme Court for its consideration the committee's recommendations regarding the twelve subjects discussed below, listed in the order of their occurrence during jury service and the trial.

JURORS: THE POWER OF 12
PART TWO

A. IMPROVING COMPLIANCE WITH JURY SUMMONS

In its 1994 report, the committee considered ways of dealing with the high number[1] of persons who fail to report for jury duty after receiving the summons directing them to do so.[2] The committee called for sending the statutorily required second notice.[3] In the long run, the committee felt that providing and publicizing a more "juror-friendly" environment would help.

Because the problem of "no-shows" persists, the committee took up the matter again in hopes of providing additional concrete suggestions. Some ideas presented were not embraced, including imposition of individual fines of up to $100 as allowed by current law,[4] the holding of roundups coupled with contempt hearings and automatic suspension of drivers' licenses.

After considerable discussion, the committee decided to make the following additional suggestions:

1. Judges should participate in greeting each new juror pool, speak and take questions.

2. Jury room staff should be encouraged to keep members of the jury pool informed of their status and expected wait times. Use of pagers for those who wish to leave the assembly room while waiting to be called should be experimented with.

In the earlier report, the number was estimated to be 10% of those who received a summons. More recent analyses put the figure as high as 25%.

Earlier Committee Recommendation No. 10 attached hereto at Appendix 2.

A.R.S. §21-331(B).

A.R.S. §21-344.

3. All trial judges should receive training in the efficient and courteous handling of juror panels and trial juries.

4. Public service announcements concerning jury service as a right and opportunity should be produced and aired. Former jurors could be asked to talk about their experiences. Recent reforms should be highlighted.

5. An annual Juror Appreciation Day, an abbreviated version of Washington, D.C.'s successful "Juror Appreciation Week," should be presented.

6. A separate standing committee of the AJC, with appropriate expertise in public relations and media issues, should be assembled to plan and produce the public service announcements and the annual Juror Appreciation Day referred to above. The Supreme Court's public information officer and his or her counterparts in the two urban counties' superior courts could form the nucleus of such a committee.

B. JURY FACILITIES STANDARDS

There is abundant rhetoric praising jurors for the important service they render. However, the lack of adequate jury facilities sends a strong negative message to jurors about their value to the justice system.

The Committee found that outside Maricopa and Pima Counties the jury facilities were either non-existent, antiquated or inadequate. In most non-metro courthouses the lack of assembly areas requires jurors to be processed while standing in the hallways, subject to contacts with parties, their families and friends, witnesses and lawyers. Closing the gap between the rhetoric and the reality of treatment can only be accomplished through a significant and sustained financial commitment to upgrade the facilities in every courthouse conducting jury trials in Arizona.

Every court conducting jury trials should achieve meaningful compliance with Arizona Jury Standard 14,[5] by implementing the following recommendations for jury facilities:

1. Juror Assembly Room/Lounge Area

The assembly room should be easy to find and co-located with the jury processing facility. All jurors and members of the jury pool should be separated from parties, lawyers, witnesses and the like.

Its configuration should allow for TV briefing/training, TV entertainment viewing, reading, writing, conversation and use of juror owned portable computers. Writing/computing carrels should be provided.

An area should be designated for some form of food/snack service, if only vending machines.

2. Courtroom Area/Jury Box

The jury box should be situated so that jurors:

a. Can easily see and hear all trial participants,

b. Cannot hear bench or counsel conferences,

c. Have direct access to deliberation room, and

d. Are not in close contact with the public.

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[5] *"Courts should provide an adequate and suitable environment for jurors.*

a. The entrance and registration area should be clearly identified and appropriately designed to accommodate the daily flow of prospective jurors to the courthouse.

b. Jurors should be accommodated in pleasant waiting facilities furnished with suitable amenities.

c. Jury deliberation rooms should include space, furnishings and facilities conducive to reaching a fair verdict. The safety and security of the deliberation rooms should be ensured.

d. To the extent feasible, juror facilities should be arranged to minimize contact between jurors, parties, counsel and the public."

Jurors should have access to and exit from the courthouse, dining facilities and restrooms without having contact with parties, their families and supporters at the trial.

3. Parking and Traffic Flow

Parking lots should be designated for juror use with their locations clearly described in the introductory information packets.

4. Disability Accommodations

The Americans with Disabilities Act (ADA) became effective for state and local government programs and services in 1992. It was estimated in 1992 by the National Institute on Disability and Rehabilitation Research that 7.5% (13.5 million) of Americans are severely limited in their ability to see, hear, speak, lift or carry, walk, use stairs, and get around. To help courts accommodate persons with disabilities, the American Bar Association, through a grant from the State Justice Institute, has published an excellent resource manual, "Into the Jury Box: A Disability Accommodation Guide for State Courts," (1994).

The Committee reaffirms its previous recommendations that every courthouse be reviewed by AOC staff to assure access to jury service by every potential juror.[6]

C. USE OF JURY CONSULTANTS

The committee recognized that professional jury consultants may be of value to a particular party in selecting a jury, in the exercise of peremptory challenges and during the trial. Nevertheless, considerable concern was expressed about their effects on the trial, possible outcomes and resulting public perception that the parties may have excessive power to shape

[6] *See Recommendation 15, Jurors: The Power of 12 (1994) (The full text of the recommendation is found at Appendix 3.)*

the jury and the result. Specifically, many committee members believe that the growing use of jury consultants detracts from the constitutional ideal of an "impartial" jury and may contribute to the "game theory" of jury selection and trial. Concerns were also expressed about the inequity of one party having resources to retain a jury consultant when the other cannot.

Because a rule restricting the use of consultants might violate constitutional rights, the committee declined to make any recommendation. Rather, the committee recommends:

1. That a reasonable reduction in the number of peremptory challenges (see Recommendation 4, below) will reduce any direct negative impact on the jury selection process. Consultants may continue to assist parties to exercise peremptory challenges "for cause" and elsewhere in the trial.

2. That trial and appellate judges must remain sensitive to the unfairness that results when one side can afford to hire jury consultants but the other cannot. At the trial level, consideration might be given to requiring parties to disclose all demographic data to the other side; and, in criminal cases, appointing a consultant for a defendant unable to pay for one or requiring disclosure by the State when the prosecution is utilizing such an expert.

D. CHANGE NUMBER OF PEREMPTORY CHALLENGES AVAILABLE TO THE PARTIES

Despite concerns that peremptory challenges may be used to manipulate the composition of the trial jury and often deny prospective jurors their rights to serve free from discriminatory jury selection practices, the committee rejected a proposal to ban peremptories outright[7] and

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[7] *Since this committee's 1994 report, abolitionist sentiment has been growing: See, e.g., Minetos v. City University of New York, 925 F.Supp. 177 (S.D.N.Y. 1996) (banned on equal protection grounds); District of Columbia Jury Project, Juries for the Year 2000 and Beyond, 24-37 (1998); Morris Hoffman, Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective, 64 U.Chi.L.Rev. 809 (1997). Kenneth J. Melilli, Batson in Practice: What We Have Learned About Batson and Peremptory Challenges, 71 Notre Dame L.Rev. 447 (1996) (study of use of peremptories; most could be accommodated as for cause strikes).*

opted to recommend, by an almost 3 to 1 margin, that the number of peremptory challenges available to the parties be reduced by one-half.[8]

The result would be:

1. Capital cases: 5 per side (down from 10)
2. Other felony cases: 3 per side (down from 6)
3. Misdemeanor cases: remain at 2 per side
4. Civil cases: 2 per side (down from 4)

Limiting the number of strikes, as recommended, will allow a party to remove the occasional jury candidate with extreme views or relevant history, but who did or might withstand a challenge for cause. Limitations will reduce the potential for shaping a jury through the use and abuse of a larger number of strikes. Batson challenges and hearings will also be reduced, as will the arbitrariness and discrimination which occurs in the selection process. Other states' jury reform efforts include reduction in the number of peremptories.[9]

An expanded "for cause" definition should therefore be adopted and enforced by trial judges. Committee members are available to assist in preparing such a proposal.[10]

The committee also recommends that trial judges vigorously initiate and enforce Batson challenges by requiring a party to show a non-discriminatory basis for the exercise of an automatic strike under questionable circumstances.

E. USE OF ANONYMOUS JURIES

The committee agreed that cases will arise where using juror numbers instead of names might well be appropriate. The use of "anonymous" juries has been used with success in

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[8] *This would require amendments to Civil Rule 47(e) and (f) and Criminal Rule 18.4(c).*
[9] *E.g., District of Columbia Jury Project, supra n.7, at 30-33.*
[10] *For a suggested expansion, see id., at 35.*

other states, some of which may expand the practice.[11] In response to this committee's earlier recommendation, this court recently amended the rules to eliminate parties' access to juror locating information except on order of the judge.[12]

We concluded that the decision to proceed with juror numbers rather than names ought to be left to the individual trial judge's sound discretion, and that there is no present need for a formal recommendation, rule or policy.

F. KEEPING PRESENT JURY SIZES

Current jury sizes are mandated by the constitution or by statute: 12 in all capital cases and trials of other felonies where the total possible sentence could amount to 30 or more years (Ariz. Const., Art 2, §23); 8 in all other felony cases and in civil cases (A.R.S. §21-102(B) and (C).)

Since the time of our original report, which did not take a position on the number of jurors, there has been substantial discussion about jury sizes. Critics of the use of juries smaller than 12 cite the negative effects on cross-representational and deliberative ideals.[13]

A minority of committee members favored returning to 12-person juries in all felony cases. However, a substantial majority voted to retain present jury sizes after concluding that the requirement of 8 jurors in most criminal cases and in all civil cases adequately addressed concerns about diversity and, together with the unanimity requirement, assures sufficient deliberation. According to the majority, returning to juries of 12 would increase the number and cost of jurors by a factor of up to 50% and would prolong trials.

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[11] *See N.J. King, Nameless Justice: The Case for Routine Use of Anonymous Juries in Criminal Cases, 49 Vand.L.R. 123 (1996).*

[12] *Civil Rule 47(A)(4); Criminal Rule 18.3.*

[13] *E.g., Michael J. Saks, The Smaller the Jury, the Greater the Unpredictability, 79 Judicature 263 (1996).*

G. FAVOR STRUCTURED JURY DISCUSSIONS OF THE EVIDENCE DURING TRIALS OF CRIMINAL CASES

Three years ago, this committee urged the Court to depart from the traditional rule of swearing the jurors to silence during the trial and permitting them to discuss the evidence only among themselves and only in the jury room, on the condition that they wait until the close of the trial and the beginning of their deliberations before making up their minds about the outcome. The recommendation included civil and criminal juries and was based on the belief that the procedures would assist juror comprehension without jeopardizing fair trials.[14]

The Court amended Civil Rule 39(f) to permit such "structured" discussions in trials of civil cases, reserving a decision for criminal proceedings. We have now had over two years' experience with this reform in civil trials. Anecdotal reports from judges, jurors and most lawyers are very positive. Beginning in the Fall of 1997, a six-month study of 200 civil trials was commenced by jury research professionals.[15] In one-half of the trials, jurors were instructed in accordance with the traditional rule--no discussions. Jurors in the remaining 100 trials were told they could discuss the evidence consistent with the new rule. Almost all of the raw data has been collected through survey forms and interviews. The experts' conclusions and report should be available by June or July, 1998.

Subject to a favorable outcome of the study of juror discussions in civil cases, the committee recommends that Criminal Rule 19.4 be amended to permit jurors in criminal cases to benefit from the change that has worked so well on the civil side. The experience there has revealed a number of benefits for jurors, including:

1. Enhanced jury comprehension of evidence and preliminary instructions on the law as a result of interactive communication;
2. Memories and impressions of testimony are better shared and questions are answered on a timely basis;

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[14] *The full text of Recommendation 37 (1994) is under Appendix 4 to this report.*
[15] *National Center for State Courts Study of Predeliberation Juror Discussions in Arizona Civil Trials (1997-98).*

3. Jurors get to know each other better and some "bonding" occurs;
4. Group questions can be better framed and submitted to the Court;
5. Juror stress is reduced;
6. "Fugitive" conversations are reduced; and
7. Deliberations are more focused and efficient since the jurors have already dealt with much of the "evidentiary foreground."

H. JUDGES NEED THE AUTHORITY TO REQUIRE DEPOSITION SUMMARIES IN SOME CASES

The committee voted unanimously in support of a revised[16] proposal to encourage or, in some cases require, use of deposition summaries at trial instead of reading page after page of actual questions and answers, especially when the latter is not necessary to an understanding of the substance of the testimony.

The proposed Rule 32(A)(5) and Comment first encourage counsel to utilize this more effective medium of communicating information to the jury. In cases where summaries are thought necessary to jurors' understanding and to avoiding waste of considerable trial time, the court is given the express authority to require some summarization. Short verbatim "snippets" may still be offered where necessary to conveying the meaning of the excerpts.

In the more than 40 years that pretrial depositions have been available for use in trials in Arizona, the method for conveying their contents to the jury has not changed, except for those few instances where judges have experimented with the use of deposition summaries. In the interest of juror comprehension, it is time to add a more effective medium. Concerns about the time that might be required of the judge to referee any differences between counsel should be alleviated by the realization that the mandatory aspect of the rule can only be invoked when the judge has an overriding concern about the jurors' abilities to comprehend a lengthy reading of deposition questions and answers. Such a judge voluntarily assumes the

[16] *The recommended rule language and comment emphasizes the duty of counsel to summarize when helpful to the jury. It also preserves the right to offer short verbatim excerpts.*

obligation to resolve any differences. Judges who presently utilize deposition summaries report that the time required of them is almost non-existent.

A recent and comprehensive treatment of the use of deposition summaries is found in the 1997 publication, Jury Trial Innovations.[17]

The proposed rule and comment follow:

PROPOSAL FOR REVISION OF RULE 32 (A)(5)

(5) Deposition Summaries. At trial, counsel may agree upon and use a concise deposition summary in lieu of a verbatim reading of depositions, or portions thereof. When deemed necessary to jury comprehension or the efficient trial of the case, the court may require that a party prepare and read a concise deposition summary. The court may permit the introduction into evidence of portions of deposition transcripts. The court may require the editing of a videotaped deposition to fairly and succinctly include only the important proceedings.

The parties shall use their best efforts to agree upon deposition summaries. If the court is required to resolve any differences, the provisions of Rule 37(a)(4)(A) of these rules and Rule 4(g), Uniform Rules of Practice, shall apply.

Proposed Committee Comment:

Deposition summaries are an effective means of giving the jury the information contained in depositions in an understandable and abbreviated form. The Arizona Rules of Evidence, Rule 1006, already encourages the utilization of summaries of documents which "cannot be conveniently examined in court...." See, in addition, Rule 611. Although depositions are a tool for obtaining information before the trial, that does not necessarily justify reading entire

[17] *T. Munsterman, P. Hannaford & M. Whitehead, Jury Trial Innovations 120-22 (National Center for State Courts 1997).*

deposition transcripts to the jury. The verbatim reading of deposition transcripts can be a tedious and boring exercise for the jury. Greatly reduced jury comprehension follows.

The introduction of important portions, or "snippets," of deposition transcripts, which allow direct introduction of key deposition questions and answers, is permitted.

I. SEQUENCING OF EXPERT TESTIMONY

In many civil trials involving science, medicine and other technical subjects, plaintiff often calls its experts out of order, and days or weeks may intervene before the jury is able to hear the defendant's expert witnesses. Still more time passes before more evidence is presented during rebuttal. It is often difficult for jurors to understand much of this technical data during the first presentation. An impaired understanding, then, is aggravated by the passage of time during which memories of matters not fully understood, fade before the subjects are brought up again.

The committee recommends that judges and attorneys be informed and trained about the advantages and techniques of presenting both sides' experts back-to-back, in one block, to aid juror comprehension. This could be done alone or in combination with brief "summaries on the science" by both counsel. The combination would further emphasize the meaning and importance of expert testimony.[18]

Variations on this theme would allow the opposing expert(s) to sit in on the others' testimony and formulate questions for counsel to be put to the testifying expert on cross-examination. Another possible format would provide for a panel discussion by both or all experts on the subject after or in lieu of testifying. The panel discussion, moderated by a neutral expert or by the judge, if necessary, would allow the experts to put questions to each other.

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[18] *Jury Trial Innovations, supra note 15, at 98-100.*

At the minimum, the committee encourages experimentation with these techniques for the presentation of experts' testimony. Judges and attorneys should be informed of the results.

J. INFORMING CRIMINAL JURIES OF THE POTENTIAL RANGE OF PUNISHMENT

Juries don't always render their verdicts in ignorance of the potential for punishment. In death penalty cases jurors are told that death is a possible punishment upon convictions. Some of these juries also learn that the only other option, for conviction of murder at least, is life imprisonment. In murder-one cases where the death penalty is not sought, the jurors are so informed. In any case where one defendant accepts a plea bargain in exchange for testimony against another defendant, the jury almost always learns of the range of sentence faced by the defendant on trial when the former co-defendant is cross-examined and during final argument by counsel.

However, in almost all other cases, juries decide guilt or innocence without knowing of the principal consequences of their decision. Some juries have been known to guess incorrectly concerning the possible sentence and have this erroneous assumption influence their verdict. Understandably, in many cases, jurors have expressed strong dissatisfaction upon learning that the defendant was the subject of a mandatory sentence the jurors believed was unjust. In most cases, jurors either don't learn of the prescribed punishment or, after learning, express general satisfaction with the range of punishment.

The committee, by a divided vote of 8 to 4, favors a rule requiring that criminal juries be informed at the outset of trial of the range of sentence for the offense(s) charged. The jury should be told again during final instructions, especially if circumstances change during trial. We noted two principal reasons for fulling informing juries concerning punishment upon conviction:

1. The jury needs to know of the consequences of a guilty verdict as an aid in deciding whether the beyond-a-reasonable-doubt burden of proof has been satisfied. The more serious the prescribed punishment (e.g., sexual assault vs. theft) the more circumspect the jurors should tend to be. A committee member had previously published on this subject.[19]

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[19] *Robert Bartels, Punishment and the Burden of Proof in Criminal Cases: A Modest Proposal, 66 Iowa L.Rev. 899 (1981).*

2. Jurors want to know and, as noted above, have a need to know this important information on a timely basis. Jurors who are surprised or even shocked upon learning of the punishment after the verdict has been announced often say they felt like pawns in a justice system that has betrayed them. The reaction is anger toward a system which keeps the decision-makers in the dark. Consistent with the innovations already approved by this court and in use around the state, this change would allow for fully-informed verdicts and resulting juror confidence in the verdict and in the criminal justice system.

The main argument against the proposal is that it will result in jury nullification in too great a number of cases. This concern should be discounted by the realization that juries currently have the power to nullify for any or no reason. Juries are presently able to choose guilt or its opposite as a result of assumptions, accurate or mistaken, concerning the likely sentence. The nullification argument suggests a lack of trust that juries will convict in the overwhelming number of cases where guilt has been proven beyond a reasonable doubt. In the distinct minority of cases where they are inclined to exercise their power to nullify out of concern for the punishment, jurors are just as likely, if not more likely, to convict of a lesser crime that carries a penalty more proportionate to the crime. We can and should trust in juries to perform their duties in the overwhelming number of cases; certainly so where the jury is more fully informed.

Implementation of this procedure will not be easy. Thought must be given to enhanced sentences due to prior convictions and to being on probation, and possible concurrence and consecutive nature of sentences, among other issues. A working group of prosecutors, defenders, judges and others should be appointed by the court to study the whole range of problems and to recommend to the Court specific solutions that can be used by trial judges when instructing juries.

K. MINORITY POSITION

This minority report is respectfully submitted by four committee members.

A rule requiring that criminal juries be informed before deliberation of the range of sentence for the offense(s) charged is both ill-advised and unnecessary. Moreover, it is contrary to the well-established rule that a jury which has no sentencing function should reach its verdict without regard to the

consequences of that verdict.[20] As the United States Supreme Court has stated, "providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their fact finding responsibilities, and creates a strong possibility of confusion."[21]

The majority cites two principal reasons for recommending this radical change in the law. First, the majority argues that a jury needs to know the consequences of a conviction as an aid to defining reasonable doubt. By this logic, reasonable doubt has not one, but many meanings, depending on the severity of the charges. There is absolutely no precedent, however, for requiring more proof for a sexual assault charge and less proof for a theft charge. Additionally, this argument falls apart when sentencing enhancements are considered. A defendant with several prior convictions and on release at the time of the new offense would face considerable punishment for even a "less severe" crime. If the jury were told of the prior convictions, the possibility exists that they would convict due to that knowledge. If they were not told of the prior convictions, they would be left with the mistaken impression that the defendant faced what seemed to be a disproportionately long sentence for apparently relatively minor misconduct.

Second, the majority claims that informing juries of the possible sentencing range would increase juror confidence in the verdict and the criminal justice system. However, while juror satisfaction is a legitimate concern, increasing juror satisfaction cannot be considered as important as ensuring a just and fair verdict for the parties involved. The function of the jury is to decide whether, on the evidence presented, the defendant is guilty of the crime charged. Undoubtedly, many jurors would prefer to not only decide guilt or innocence, but also pass sentence. However, the job of determining sentence belongs to the judge, and to the legislature (elected by the people), which sets sentencing guidelines.

The majority's argument sanctions jury nullification. While a jury has the power to nullify, juries are not now, and should not be, encouraged to nullify a guilty verdict based on a necessarily incomplete understanding of the potential sentence the defendant faces if convicted.

The majority's statement that "[i]mplementation of this procedure will not be easy" is an extraordinary understatement. Arizona's sentencing scheme has been called "enormously complex" and compared

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[20] *See, e.g., Shannon v. United States, 512 U.S. 573, 579, 114 S.Ct. 2419, 2425, 129 L.Ed.2d 459 (1994); State v. Allie, 147 Ariz. 320, 326, 710 P.2d 430, 436 (1985); State v. Koch, 138 Ariz. 99, 105, 673 P.2d 297, 303 (1983); State v. Nieto, 186 Ariz. 449, 924 P.2d 453 (App. 1996).*

[21] *Shannon v. United States, 512 U.S. at 579, 114 S.Ct. at 2425, citing Pope v. United States, 298 F.2d 507, 508 (5th Cir. 1962).*

to "matrix theory in abstract algebra."[22] In addition to the inherent complications of the sentencing code, any sentence will vary based on which counts the jury convicts, whether lesser-included offenses are given to the jury (which will be unknown until the close of evidence), and whether the prosecution is able to successfully prove prior convictions. Moreover, the jury will essentially be asked to pass judgment on the appropriateness of a sentence without the benefit of a pre-sentence report or aggravating or mitigating evidence.

In sum, there is no need to abandon the well-established rule that a jury is not to consider potential penalties prior to deliberation. The supposed benefits of informing juries of potential penalties prior to deliberation are speculative at best. The potential harm and complications, however, are enormous.

L. GUIDELINES FOR SEQUESTRATION OF JURORS

The committee discussed whether guidelines or policies are needed for sequestration of juries after witnessing the negative effects of the oppressive conditions of the sequestered jury in a lengthy and highly publicized California trial.

No one on the committee could recall any Arizona jury being sequestered, even during deliberations, in the past 20 years. Simply put, the culture seems to have changed, and sequestration has fallen into disuse. However, a judge might well have to seriously consider sequestration in the event of a highly publicized, high profile case.

The committee concluded that Standard 19, Arizona Jury Management Standards (1992),[23] should suffice for general guidance when sequestration is considered. The trial judge, after conferring with counsel, will have to provide specific detail to fit the needs of the particular case. Further guidelines of a statewide nature are not necessary at this time.

M. RETAIN THE REQUIREMENT OF UNANIMITY IN CRIMINAL CASES

In the past two or three years, concerns over perceived miscarriages in justice caused by hung juries and the increasing diversity of juries in today's society have resulted in serious proposals that the

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[22] *State v. Tarango, 185 Ariz. 208, 214, 914 P.2d 1300, 1306 (1996) (Justice Martone's dissent).*
[23] *Standard 19, "Sequestration of Jurors," is set forth in full under Appendix 5.*

requirement of a unanimous jury verdict in criminal cases be modified.[24] Many thoughtful arguments have been made to retain the unanimity requirement.[25]

During the committee's discussion of this issue, there was strong support for retaining the unanimity requirement--on its own merits, because the number of hung juries due to one or two holdouts is rare, and because of the new procedure for dialoging with juries reporting impasse approved by this court in 1995. (Criminal Rule 22.4) No serious alternative was offered to the present constitutional requirement of a unanimous verdict in all criminal cases.[26]

In conclusion, the committee decided, by a 14 to 1 vote, that there should be no change in the unanimity requirement.

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[24] *See, e.g., Recommendation 4.18, California Blue Ribbon Commission on Jury System Improvements (1996) (proposal that would allow verdict of 11 to 1 after 6 hours of deliberation; most serious cases excepted).*

[25] *See, e.g., Jeffrey Abramson, We, the Jury (1994) (unanimity requirement furthers deliberative ideal).*

[26] *Ariz. Const., Art. 2, §23.*

CONCLUSION

The Supreme Court Committee on the More Effective Use of Juries, Part 2, respectfully submits this report and its seven (7) affirmative recommendations for consideration by the Arizona Judicial Council and the Supreme Court.

Members of the committee will remain available to appear before the Arizona Judicial Council and the Court to discuss the recommendations should that be desired.

APPENDIX A

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APPENDIX B

10. **Deal With Failures to Respond to Jury Summons**

> The follow-up procedures provided by statute for those who fail to respond to jury summons should be uniformly complied with, preferably with the aid of automation, but manually if necessary.

It is estimated that at least 10% of persons actually served with jury summons fail to respond and appear. For example, in 1992 the jury commissioner in Maricopa County mailed over 345,000 summonses. About two-thirds of those were delivered. The number of persons served,

but who failed to respond, was about 23,000. Given time and cost considerations, court officials do not resummon by a second mailing as required by A.R.S. §21-331(B). Pima County does send the second mailing. Neither county attempts any further enforcement action, such as attachment for contempt and imposition of a fine of up to one hundred dollars, as permitted by A.R.S. §21-334.

In order to increase both compliance with jury summonses and the diversity of jury pools, and out of consideration for the majority of persons who do comply, the committee recommends that, at a minimum, the trial courts in all counties comply with the statute requiring follow-up mailings. Using automated tracking systems will facilitate compliance at a long term cost less than current manual operations.

No further enforcement action is recommended by the committee, at least in the usual cases. It was felt that the public education efforts suggested in Recommendation 1, coupled with considerate and efficient treatment and utilization of jurors called to service, will, in the long term, produce a higher level of compliance with the summons.

APPENDIX C

15. The Needs of Jurors who are Disabled Should be Met

> To ensure maximum possible participation of disabled persons in jury service, and to fully comply with the Americans With Disabilities Act (ADA), two needs must be addressed: (A) The Supreme Court should require that the trial courts promptly comply with the ADA, especially where jurors are concerned, and (B) Educational programs on these subjects should be conducted for judges and court staff.

Including otherwise qualified people with disabilities on juries is a worthwhile objective in and of itself. However, with the passage by Congress in 1990 of the Americans with Disabilities Act ("ADA"),[19] it became imperative that state courts address functional limitations in and around courthouses that might impede persons with disabilities--whether

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[19] *42 U.S.C.A. §§12111, et seq. The Supreme Court has required Arizona courts to comply with the ADA. Administrative Order # 92-32 (Access to Court Services by Persons with Disabilities, October 19, 1992).*

they be physical, sensory, communicative or cognitive--from fully participating as a juror.

The committee recommends that the Supreme Court, through either the Arizona Judicial Council, the Administrative Office of the Courts, or a special committee or task force, immediately address two needs--compliance and education.

a. **Compliance:** The committee's sense is that while courts have recently made considerable improvements in providing physical access to court and jury facilities, much remains to be done if full participation in court processes by disabled Arizonans is to be ensured. The Supreme Court should require and monitor compliance by all courts in the state.

b. **Education:** Judges, court staff, lawyers and jurors (potential and actual) could benefit from programs of training and education designed to make them more aware of the differing needs of jurors with various disabilities, and that potential jurors ought not be excluded from service just because of their disability. In addition, such programs could identify creative, affordable and practical measures that can and should be implemented that would meet the needs of disabled jurors.

Checklists and guidelines have been developed for courts' use in moving toward compliance with the Act.[20] Use of these and other publications in combination should greatly assist the judicial branch in discharging its legal and moral responsibilities to citizens with disabilities, who should have equal opportunities to serve as jurors.

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[20] *E.g.*, ADA Checklist for Courts, National Center for State Court (1992); and "Opening the Courthouse Door," An ADA Access Guide for State Courts, American Bar Association (1992).

[21] *A.R.S. §21-221.*

[22] *Id.*

APPENDIX D

37. Allow Jurors to Discuss the Evidence Among Themselves During the Trial

> After being admonished not to decide the case until they have heard all the evidence, instructions of law and arguments of counsel, jurors should also be told, at the trial's outset, that they are permitted to discuss the evidence among themselves in the jury room during recesses.

The traditional admonition that forbids any and all discussions about the case among jurors until deliberations commence[63] is a corollary of the "passive juror" model. Through enforced passivity, jurors are expected to merely store all evidence for later use and to suspend all judgments until the trial is over. The assumption is that pre-deliberation discussions of the evidence by jurors will inevitably lead to premature judgments about the case.

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[63] *See Criminal Rule 19.4; Civil Rule 39(f).*

The committee concluded that this limitation of all discussions among trial jurors and the accompanying assumption that jurors can and do suspend all judgments about the case are unnatural, unrealistic, mistaken and unwise. Behavioral researchers agree that the juror's natural tendency is to actively process information as and after it is received, forming at least tentative preferences or judgments about the evidence as they do.[64] By their own admissions to jury researchers, at least 11 to 44% of jurors discuss the evidence among themselves before deliberations.[65]

We agree with those who favor permitting structured or regulated discussions of the evidence among jurors during trial as long as they are told that it is important to reserve final judgment until all the case has been presented and why it is important to do so. These authorities conclude that the traditional rule forbidding all discussions is anti-educational, nondemocratic and not necessary to ensure a fair trial.[66]

Structured jury discussions of the evidence during trial will benefit the jurors and the trial a number of ways:

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[64] *E.g., R. Hastie, S. Penrod & N. Pennington, Inside the Jury, 24 (1983) and Forston, Sense and Non-Sense: Jury Trial Communication, 1975 B. Y. U. L. Rev. 601, 612.*

[65] *Loftus & Leber, Do Jurors Talk?, 22 Trial 59, 60 (Jan. 1986); Note, Jurors Judge Justice: A Survey of Criminal Jurors, 3 N. Mex. L. Rev. 352, 358 (1973).*

[66] *A. Austin, Complex Litigation Confronts the Jury System, 103-04 (1984); Schwarzer, Reforming Jury Trials, 1990 U. Chi. L. Forum 119, 142-43; Friedland, The Competency and Responsibility of Jurors in Deciding Cases, 85 Nw. L. Rev. 190, 199, 208-09 (1990); and Austin, "Why Jurors Don't Heed Trials," National Law Journal, 15, 18 (Aug. 12, 1985).*

a. Juror comprehension will be enhanced, given the benefits of interactive communication;

b. Questions can be asked and impressions shared on a timely basis rather than held until deliberations or forgotten;

c. A juror's tentative or preliminary judgments might surface and be tested by the group's knowledge; and

d. Divisive "fugitive" conversations and cliques might be reduced, given the opportunities for "venting" in the presence of the entire jury in the jury room.

Civil Rule 39(f) and Criminal Rule 19.4 should be amended to provide that:

> Trial jurors shall be instructed that they are permitted to discuss the evidence among themselves in the jury room during recesses from trial, when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence.

Arizona's Jury Standards should be revised to incorporate this important change in practice.[67]

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[67]*See App. C-10.*

A suggested preliminary jury instruction, one that accommodates jurors' natural tendencies, but which discourages premature decisions on the ultimate issues, is appended to this report.[68]

[68]*See App. G.*

[69]*See A.B.A. Litigation Section Report, supra at 43-49 and 610-13; Steele & Thornburg, Jury Instructions: A Persistent Failure to Communicate, 74 Judicature 249, 250 nn. 10-17 (1991).*

APPENDIX E

STANDARD 19: SEQUESTRATION OF JURORS

(a) A jury should be sequestered only for the purpose of insulating its members from improper information or influences.

(b) The trial judge should have the discretion to sequester a jury on the motion of counsel or on the judge's initiative, and the responsibility to oversee the conditions of sequestration.

(c) Standard procedures should be promulgated to make certain that:

(i) The purpose of sequestration is achieved; and,

(ii) The inconvenience and discomfort of the sequestered jurors is minimized.

(d) Training should be provided to personnel who escort and assist jurors during sequestration. Use of personnel actively engaged in law enforcement for escorting and assisting jurors during sequestration is discouraged.

8/4/92
JSSTNDRD